A

Public Prosecutor v Marwan bin Ismail

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–156 OF 2006

MOHD GHAZALI, ZULKEFLI AND ABDULL HAMID EMBONG JJCA

28 DECEMBER 2007

C

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1) — Trafficking in dangerous drugs — Whether case triable exclusively in the High Court — Whether magistrate's court only empowered to transmit case on initial mention to High Court — Whether magistrate empowered to remand accused pending

D

preparation of chemist's report — Whether accused to be remanded in custody until consent of public prosecutor obtained — Dangerous Drugs Act 1952 s 41A

Criminal Procedure — Consent or sanction — Consent — Nature of — Whether

E

intended as safeguard to accused — Consent, how produced — Whether consent to be first obtained before drug trafficking case transmitted by appropriate subordinate court to High Court

F

Criminal Procedure — Jurisdiction of court — Magistrate's court — Drug trafficking case — Procedure to be undertaken when such case first mentioned in magistrate's court — Whether magistrate empowered to remand accused pending preparation of chemist's report — Whether accused to be remanded in custody until consent of public prosecutor obtained — Whether transmission of such case

G

by magistrate's court constitutes a 'further step' in prosecution — Dangerous Drugs Act 1952 s 41A

Criminal Procedure — Prosecution — Commencement of prosecution — Drug

H

trafficking case — Whether prosecution of case to commence in the High Court — Whether transmission of case to High Court by appropriate subordinate court constitutes a 'further step' in prosecution — Special procedure under Dangerous Drugs Act 1952 s 41A

I

Criminal Procedure — Prosecution — Consent of public prosecutor — Nature of — Whether intended as safeguard to accused — Consent, how produced — Whether such consent to be first obtained before drug trafficking case transmitted by appropriate subordinate court to High Court

Criminal Procedure — Transfer of cases — Jurisdiction of magistrate's court — Drug trafficking case — Transmission of case to High Court — Whether transmission constituted a 'further step' in prosecution

The accused was tentatively charged with drug trafficking under s 39B(1) of the Dangerous Drugs Act 1952 ('the DDA'). When his case was called up for initial mention in the magistrate's court, the magistrate withheld the transmission of his case to the High Court. Instead, the magistrate remanded the accused for two months, pending preparation of the chemist's report on the seized drugs. The matter was subsequently called up on revision in the High Court. The High Court judge held that to remand the accused person for a further two months was unlawful and amounted to the usurpation of a judicial function by the prosecution. The High Court judge in revising the matter ordered that the accused be reproduced before the magistrate to reconsider whether the case should be transmitted to the High Court under s 41A of the DDA or alternatively, whether the accused should be discharged pursuant to s 29 of the Criminal Procedure Code ('CPC'). The public prosecutor thus appealed to the Court of Appeal. The deputy public prosecutor ('DPP') submitted that the magistrate had no power to transmit the case to the High Court without the consent of the public prosecutor under s 39B(3) of the DDA. The DPP also submitted that the High Court's reference to s 41A of the DDA was a misdirection. In essence, the DPP submitted that the prosecution of an accused charged with drug trafficking should be put off until the consent of the public prosecutor is obtained. Until such consent is obtained, the accused should be remanded in custody and s 41A of the DDA should not be applied.

Held, dismissing the appeal:

(1) Section 41A of the DDA deals with the procedure to be undertaken in respect of cases triable exclusively by the High Court. A charge for drug trafficking under s 39B(1) — which attracts the mandatory death penalty — is such a case. Thus, this special provision governs the procedure to be followed in respect of a person charged under the said section (see paras 12–13).

(2) The consent of the public prosecutor is a public policy requirement which Parliament has provided for the safeguard of the accused person. In practice, this step is undertaken by producing a letter of consent from the public prosecutor (or a DPP pursuant to s 376 of the CPC,

since the consent of the public prosecutor under s 39B(3) is not a personal power) before the High Court upon the commencement of the trial (see para 15).

(3) Section 41A of the DDA is a special provision under a special law which operates independently of any other provisions. Pursuant to s 41A of the DDA, an accused charged with an offence under the DDA triable exclusively by a High Court, is to be produced before 'the appropriate subordinate court', whereupon such subordinate court is under a mandatory obligation to order a transmission of the case to the High Court (see para 16); *Public Prosecutor v Lee Chan Sang* [1989] 1 MLJ 224 followed.

(4) The prosecution of such a case begins in the High Court, when the charge is read and the accused is asked to enter a plea to the charge. The giving or withholding of the public prosecutor's consent, being a prosecutorial power, may be exercised even at this stage. The exercise of this power by the public prosecutor is unconnected with the special procedure for transmission under s 41A of the DDA (see paras 17–18); *Perumal v Public Prosecutor* [1970] 2 MLJ 265 followed.

(5) The act of a magistrate in transmitting the case to the High Court under s 41A of the DDA is not a further step in the prosecution. The DDA does not also empower a magistrate to remand an accused tentatively charged for trafficking under s 39B(1), pending the outcome of the drug analysis/chemist's report (see para 19); *Public Prosecutor v Oladotun Lukmaru Umaru & Ors* [1991] 1 MLJ 187 and *Public Prosecutor v Ilamaran* [1992] 1 MLJ 672 overruled.

[Bahasa Malaysia summary

Tertuduh pada mulanya dituduh kerana mengedar dadah di bawah s 39B(1) Akta Dadah Berbahaya 1952 ('ADB'). Apabila kes beliau dipanggil untuk sebutan awal di mahkamah majistret, majistret menahan penghantaran kesnya ke Mahkamah Tinggi. Sebaliknya, majistret telah menahan tertuduh selama dua bulan, sementara menunggu penyediaan laporan ahli kimia berhubung dadah yang dirampas. Perkara itu kemudiannya telah dipanggil untuk semakan di Mahkamah Tinggi. Hakim Mahkamah Tinggi memutuskan bahawa untuk menahan tertuduh untuk dua bulan lagi adalah menyalahi undang-undang dan merupakan rampasan fungsi kehakiman oleh pihak pendakwaan. Hakim Mahkamah Tinggi dalam menyemak perkara tersebut memerintahkan agar tertuduh dibawa ke hadapan majistret untuk menimbangkan semula sama ada kes tersebut patut dihantar ke Mahkamah Tinggi di bawah s 41A ADB atau secara alternatif, sama ada tertuduh patut dibebaskan menurut s 29 Kanun Prosedur Jenayah ('KPJ'). Pendakwa raya oleh itu telah merayu ke Mahkamah Rayuan. Timbalan pendakwa raya

('TPR') berhujah bahawa majistret tersebut tidak mempunyai kuasa untuk menghantar kes tersebut ke Mahkamah Tinggi tanpa persetujuan pendakwa raya di bawah s 39B(3) ADB. TPR juga berhujah bahawa rujukan Mahkamah Tinggi kepada s 41A ADB adalah suatu salah arah. Pada dasarnya, TPR berhujah bahawa pendakwaan seorang tertuduh yang dituduh mengedar dadah patut ditangguhkan sehingga persetujuan pendakwa raya diperoleh. Sehingga persetujuan sedemikian diperoleh, tertuduh sepatutnya berada dalam tahanan dan s 41A ADB tidak patut digunakan.

Diputuskan, menolak rayuan:

(1) Seksyen 41A ADB adalah mengenai prosedur yang perlu diambil berkaitan kes-kes yang perlu dibicarakan secara eksklusif oleh Mahkamah Tinggi. Satu pertuduhan pengedaran dadah di bawah s 39B(1) — yang membawa penalti mati mandatori — adalah salah satu kes sebegini. Oleh itu, peruntukan khas ini mengawal prosedur yang perlu diikut berkaitan seseorang yang dituduh di bawah seksyen tersebut (lihat perenggan 12–13).

(2) Persetujuan pendakwa raya merupakan keperluan polisi awam yang mana Parlimen telah memperuntukkan untuk melindungi seseorang tertuduh itu. Kebiasaannya, langkah ini dilakukan dengan mengemukakan sepucuk surat persetujuan daripada pendakwa raya (atau TPR menurut s 376 KPJ, memandangkan persetujuan pendakwa raya di bawah s 39B(3) bukan kuasa peribadi) di hadapan Mahkamah Tinggi selepas perbicaraan bermula (lihat perenggan 15).

(3) Seksyen 41A ADB adalah peruntukan khas di bawah undang-undang khas yang beroperasi sendiri tanpa bergantung kepada mana-mana peruntukan lain. Menurut s 41A ADB, seorang tertuduh yang dituduh dengan suatu kesalahan di bawah ADB yang perlu dibicarakan secara eksklusif oleh Mahkamah Tinggi, hendaklah dibawa ke hadapan 'the appropriate subordinate court', di mana mahkamah bawahan berikut adalah di bawah obligasi mandatori untuk memerintahkan satu penghantaran kes itu ke Mahkamah Tinggi (lihat perenggan 16); *Public Prosecutor v Lee Chan Sang* [1989] 1 MLJ 224 diikut.

(4) Pendakwaan untuk kes sebegini bermula di Mahkamah Tinggi, apabila pertuduhan dibaca dan tertuduh diminta memasukkan pengakuan terhadap pertuduhan tersebut. Pemberian atau penahanan persetujuan pendakwa raya, yang merupakan kuasa pendakwaan, boleh digunakan pada peringkat ini. Penggunaan kuasa ini oleh pendakwa raya tiada

kaitan dengan prosedur khas untuk penghantaran di bawah s 41A ADB (lihat perenggan 17–18); *Perumal v Public Prosecutor* [1970] 2 MLJ 265 diikut.

(5) Tindakan majistret yang menghantar kes tersebut ke Mahkamah Tinggi di bawah s 41A ADB bukan langkah seterusnya dalam pendakwaan. ADB juga tidak memberikan kuasa kepada majistret untuk menahan tertuduh yang pada mulanya dituduh mengedar di bawah s 39B(1), sementara menunggu analisis dadah/laporan ahli kimia (lihat perenggan 19); *Public Prosecutor v Oladotun Lukmaru Umaru & Ors* [1991] 1 MLJ 187 dan *Public Prosecutor v Ilamaran* [1992] 1 MLJ 672 ditolak.]

Notes

For a case on jurisdiction of magistrate's court, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4525.

For cases on commencement of prosecution, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2921–2922.

For cases on consent, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1468–1482.

For cases on consent of public prosecutor, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2930–2931.

For cases on magistrate's court, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2321–2364.

For cases on s 39B(1) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 308–319.

Cases referred to

PP v Ilamaran [1992] 1 MLJ 672 (overd)
PP v Lee Chan Sang [1989] 1 MLJ 224 (folld)
PP v Oladotun Lukmaru Umaru & Ors [1991] 1 MLJ 187 (overd)
Perumal v PP [1970] 2 MLJ 265 (folld)

Legislation referred to

Criminal Procedure Code ss 29, 325, 376, Chapter XVII, Chapter XX
Dangerous Drugs Act 1952 ss 39B, 39B(1), 39B(3), 39B(4), 41A

Appeal from: Criminal Review No 43–18 of 2006 (High Court, Shah Alam)

Wong Ching Kiat (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Respondent in person.

Abdull Hamid Embong JCA (delivering judgment of the court):

[1] The sole question for our decision is simply what a magistrate needs to

do in a case where an accused person who is tentatively charged for drugs trafficking under s 39B(1) Dangerous Drugs Act 1952 is brought up before him for a mention.

[2] The High Court at Shah Alam had called up this matter for a revision. The learned judge set aside the order of the magistrate who had earlier remanded the accused for a further period of two months when his case was brought up before the magistrate for an initial mention. The reason given for the further remand was that the chemist report on the drugs which was the subject matter of a tentative charge for trafficking under s 39B(1) of the Dangerous Drugs Act 1952 ('DDA') against the accused was not ready. As such the magistrate withheld the transmission of the case to the High Court.

[3] Both the learned deputy public prosecutor and the accused person were represented and advanced submissions at the revision proceedings before the High Court. The learned judge concluded that to further remand the accused person for another two months was unlawful and amounted to the usurpation of a judicial function by the prosecution. The learned judge then revised the order made by the magistrate (for a further remand of the accused) pursuant to his power of revision under s 325 of the Criminal Procedure Code ('CPC'). The High Court then ordered that the accused be reproduced before the magistrate to reconsider whether the case should be transmitted to the High Court under s 41A of the DDA or alternatively for his discharge pursuant to s 29 of the CPC.

[4] Against that order the learned public prosecutor appealed to this court.

[5] Before us the learned deputy public prosecutor argued that the magistrate has no power to transmit the case to the High Court without the consent of the public prosecutor under s 39B(3) of the DDA. That section reads:

> (3) A prosecution under this section shall not be instituted except by or with the consent of the Public Prosecutor;
>
> Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, *but the case shall not be further prosecuted until the consent has been obtained.*
>
> (Emphasis added.)

Subsection (4) reads as follows:

> (4) When a person is brought before a Court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead, and the provisions of the law for the time being in force relating to criminal procedure shall be modified accordingly.

[6] The DPP argued that reliance by the learned judge on s 41A of the DDA was a clear misdirection relying, in the main, on the decision of the High Court in the case of *Public Prosecutor v Ilamaran* [1992] 1 MLJ 672 and quoting in particular this passage of that judgment (at p 676):

> … the accused is brought before the court when the charge may be read and explained to him. He will not be asked to plead to the charge (see s 39B(4) and neither will he be formally tried for the offence with which he had been tentatively charged until the consent by the public prosecutor as required under s 39B(3) has been obtained. In the meantime the offending drugs should, as expeditiously as the circumstances of the case permit, be delivered to the chemist for analysis and final determination of its weight and contents. Pending the chemist report and the consent from the public prosecutor, the accused may by virtue of the proviso to sub-s (3) of s 39B, be remanded in custody.

[7] The case of *Public Prosecutor v Oladotun Lukmaru Umaru & Ors* [1991] 1 MLJ 187 was also relied upon where the learned High Court judge there opined that the public prosecutor's consent is a necessary safeguard that needs to be undertaken before one is exposed to a prosecution for an offence of drug trafficking in the High Court.

[8] It was further submitted that it would be unfair to subject an accused person to a charge under this section if the weight of the drugs had not been determined upon an analysis by the chemist. As such s 41A of the DDA should be read subject to s 39B(3) of the DDA.

[9] Our understanding of the learned DPP's submission is that in short, the prosecution of an accused person for an offence of drugs trafficking under s 39B(1) of the DDA should be put on hold until a consent of the public prosecutor has been given. The accused person may then, pending that consent be remanded in custody, and that s 41A of the DDA till then, cannot be applied.

[10] Section 41A of the DDA reads:

41A Special Provision relating to transmission of a case to and trial by, the High Court.

(1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case of the High Court without holding a preliminary inquiry under Chapter XV11 of the Criminal Procedure Code, and cause the person to appear or brought before such Court as soon as practicable.

(2) When the accused person appears or brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.

(3) The trial of a case transmitted to the High Court under subsection (1) shall be by a Judge of the High Court sitting alone, and the provisions of Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial.

(4) The provision of subsections (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary.

[11] In the case of *Public Prosecutor v Lee Chan Sang* [1989] 1 MLJ 224, the Supreme Court said this of that section (at pp 225–226):

> Section 41A of the Act therefore confers jurisdiction on the magistrate's court only in so far as to receive the production of the accused and to have the charge explained to him and then to transmit the case to the High Court forthwith without holding a preliminary inquiry.
>
> The magistrate's court has no jurisdiction even to record a plea of the charge. Indeed s 41A(3) of the Act directs that the trial of the case shall be by a judge of the High Court sitting alone.
>
> Section 39B(3) of the Act provides that a prosecution under that section shall not be instituted except by or with the consent of the public prosecutor. That subsection also direct that the case shall not be further prosecuted until the consent has been obtained. In respect of the respondent the public prosecutor's consent was issued on only on 16 July 1984.
>
> Section 39B(4) provides that when a person is brought before a court but before the public prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead.

[12] Section 41A of the DDA deals with the procedure to be undertaken in respect of cases triable exclusively by the High Court. A charge for

trafficking under s 39B(1), an offence that attracts the mandatory death penalty, is certainly a case triable exclusively by the High Court.

[13] In our view therefore, this special provision governs the procedure to be followed in respect of a person charged under s 39B(1) of the DDA. The magistrate has no option but to strictly adhere to the steps to be undertaken thereunder. If an accused person charged for an offence under s 39B(1) of the DDA is produced before a magistrate, he must do the following:

(i) have the charge read to him;

(ii) explain to him the charge;

(iii) not to record any plea by the accused, even if he chose to make one.

(iv) transmit the case to the High Court;

(v) cause the accused person to be brought before the High Court as soon as is practicable.

[14] It may be noted that the reference to the preliminary inquiry in the section is now superfluous since Chapter XVII of the CPC has now been repeated (see Act A908 wef 17 February 1995).

[15] Section 39B(3) of the DDA, deals with a step in the prosecution of an accused person charged under s 39B(1) of the DDA. The consent of the public prosecutor is a public policy requirement which Parliament has provided for the safeguard of the accused person. In practice this step is undertaken by producing a letter of consent from the public prosecutor (or a deputy public prosecutor pursuant to s 376 of the CPC, since the consent of the public prosecutor under s 39B(3) is in effect, not a personal power), before the High Court upon the commencement of the trial. It must be emphasised that once the case has been transmitted to the High Court, the provisions regarding trials before the High Court as provided in Chapter XX of the CPC takes effect.

[16] Section 41A of the DDA is a special provision under a special law which operates independently of any other provisions. It provides for a convenient procedure whereby one who is charged with a capital offence under the DDA which is triable only by a High Court may be produced before 'the appropriate subordinate court' (note that it need not be a magistrate's court) in order to obtain an order for transmission. Once produced, that court is under a mandatory obligation to order a transmission of the case. This is the clear directive of the Supreme Court in *Public Prosecutor v Lee Chan Sang*.

[17] The prosecution of the case on the other hand begins in the High Court, when the charge is read and the accused is asked to plea to it (see *Perumal v Public Prosecutor* [1970] 2 MLJ 265).

[18] Thus giving a consent or the withholding of it, being a prosecutorial power, may be exercised even at that stage. The exercise of this power by the public prosecutor is in our view unconnected with the special procedure for transmission under s 41A of the DDA. We cannot therefore accept the proposition that s 41A has to be read subject to s 39B.

[19] With respect, we cannot agree with and hold it as wrong, the view in *Public Prosecutor v Oladotun Lukmaru Umaru* that the act of a magistrate in transmitting the case to the High Court under s 41A is a further step in the prosecution. In our view, the prosecution of the case, following *Perumal*, begins only at the High Court. Similarly we would also hold that the ruling of the learned judge in *Ilamaran* that an accused person in that situation may be remanded in custody pending the outcome of the analysis of the drugs to be wrongly decided. The DDA does not empower a magistrate to remand an accused person tentatively charged for trafficking under s 39B(1).

[20] For these reasons, this appeal is dismissed. However upon our deliberation of the learned judge's order, we are minded to also set that aside and in place make an order that this case be remitted to the magistrate's court to make an order under s 41A of the DDA.

Appeal dismissed.

Reported by Andrew Christopher Simon